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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XD269

Taking of Threatened or Endangered Marine Mammals Incidental to Commercial Fishing Operations; Issuance of Permit

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA), NMFS hereby issues a permit for a period of three years to authorize the incidental, but not intentional, taking of individuals of three stocks of marine mammals listed as threatened or endangered under the Endangered Species Act (ESA) by vessels involved in the Hawaii deep-set and shallow-set longline fisheries: the endangered humpback whale, (*Megaptera novaeangliae*), Central North Pacific stock; sperm whale, (*Physeter macrocephalus*), Hawaii stock; and false killer whale, (*Pseudorca crassidens*), Main Hawaiian Islands insular false killer whale (MHI IFKW) stock.

DATES: This permit is effective for a three-year period beginning [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Reference material for this permit, including the negligible impact determination (NID) and a list of references cited in this notice, is available on the Internet at the following address: http://www.fpir.noaa.gov/DIR/dir_public_documents.html. Recovery plans for these species are available on the Internet at the following address:

[http:// www.nmfs.noaa.gov/pr/recovery/plans.htm#mammals](http://www.nmfs.noaa.gov/pr/recovery/plans.htm#mammals). Information on the False Killer Whale Take Reduction Plan is available on the Internet at the following address:

http://www.fpir.noaa.gov/PRD/prd_FKW_take_reduction_team.html. Copies of the reference materials may also be obtained from the NMFS Pacific Islands Regional Office, Protected Resources Division, 1845 Wasp Blvd., Building 176, Honolulu, HI, 96818.

FOR FURTHER INFORMATION CONTACT: Dawn Golden, NMFS Pacific Islands Region, (808) 725-5144, or Shannon Bettridge, NMFS Office of Protected Resources, (301) 427-8402.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(E) of the Marine Mammal Protection Act (MMPA), 16 U.S.C. 1361 et seq., states that NOAA's National Marine Fisheries Service (NMFS), as delegated by the Secretary of Commerce, shall for a period of up to three years allow the incidental taking of marine mammal species listed under the Endangered Species Act (ESA), 16 U.S.C. 1531 et seq., by persons using vessels of the United States and those vessels which have valid fishing permits issued by the Secretary in accordance with section 204(b) of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1824(b), while engaging in commercial fishing operations, if NMFS makes certain determinations. NMFS must determine, after notice and opportunity for public comment, that: (1) incidental mortality and serious injury (M&SI) will have a negligible impact on the affected species or stock; (2) a recovery plan has been developed or is being developed for such species or stock under the ESA; and (3) where required under section 118 of the MMPA, a monitoring program has been established, vessels engaged in such fisheries are registered in accordance with section 118 of the MMPA, and a take reduction plan has been developed or is being developed for such species or stock. NMFS has made a

determination that incidental taking from commercial fishing will have a negligible impact on the endangered humpback whale, (Megaptera novaeangliae), Central North Pacific (CNP) stock; sperm whale, (Physeter macrocephalus), Hawaii stock; and false killer whale, (Pseudorca crassidens), MHI IFKW stock. Recovery plans have been completed for humpback and sperm whales, and a recovery plan has been initiated for MHI IFKW.

On June 12, 2014 (79 FR 33726), NMFS proposed to issue a permit under MMPA section 101(a)(5)(E) to vessels registered in the Hawaii deep-set longline fishery to incidentally take individuals from three stocks of threatened or endangered marine mammals: the CNP stock of humpback whales, the Hawaii stock of sperm whales, and the MHI IFKW; and to vessels registered in the Hawaii shallow-set longline fishery to incidentally take individuals from the CNP stock of humpback whales. The data for considering these authorizations were reviewed coincident with the preparation of the 2014 MMPA List of Fisheries (LOF or List) (79 FR 14418, March 14, 2014), the 2013 marine mammal stock assessment reports (SARs) (Carretta et al. 2014; Allen and Angliss 2014), recovery plans for humpback and sperm whales, the False Killer Whale Take Reduction Plan (FKWTRP), and other relevant sources. In addition, we have also considered more recent data for false killer whales that have not yet been incorporated into the marine mammal SARs, and a predictive model that seeks to anticipate future fisheries interactions based on recent changes to the fishery (the modified longline exclusion zone, and gear modifications) that were implemented through the FKWTRP.

The vessels operating in the Hawaii deep-set and the shallow-set longline fisheries are in the ranges of affected stocks and are currently considered for authorization. A detailed description of these fisheries can be found below. The Hawaii deep-set longline fishery is the only Category I fishery under the MMPA operating around Hawaii. The Hawaii shallow-set

longline fishery is a Category II fishery; all other Category II fisheries that may interact with the marine mammal stocks observed off the coast of Hawaii are state-managed and are not considered for authorization under this permit. Participants in Category III fisheries are not required to obtain incidental take permits under MMPA section 101(a)(5)(E) but are required to report injuries or mortalities of marine mammals incidental to their operations.

Basis for Determining Negligible Impact

As described above, prior to issuing a permit to take ESA-listed marine mammals incidental to commercial fishing, NMFS must determine if M&SI incidental to commercial fisheries will have a negligible impact on the affected species or stocks of marine mammals. NMFS satisfied this requirement through completion of a negligible impact determination (see ADDRESSES). NMFS clarifies that incidental M&SI from commercial fisheries includes M&SI from entanglement or hooking in fishing gear. See the NID for more detailed information.

Although the MMPA does not define “negligible impact,” NMFS has issued regulations providing a qualitative definition of “negligible impact” for small take authorizations as defined in 50 CFR 216.103 and, through scientific analysis, peer review, and public notice, developed a quantitative approach applied here, as “an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival” (50 CFR 216.103). The development of the approach and process was outlined in detail in the final NID and was included in previous notices for other permits to take threatened or endangered marine mammals incidental to commercial fishing (72 FR 60814, October 26, 2010 for the CNP stock of humpback whales).

Criteria for Determining Negligible Impact

In 1999, NMFS adopted criteria for making negligible impact determinations for MMPA 101(a)(5)(E) permits (64 FR 28800; May 27, 1999). The 1999 negligible impact criteria are non-binding guidance and do not limit NMFS' discretion to take into account additional relevant information in determining a fishery's expected impacts on a particular marine mammal stock. In applying the 1999 criteria to determine whether M&SI incidental to commercial fisheries will have a negligible impact on a listed marine mammal stock, Criterion 1 (total human-related M&SI is less than 10% of the potential biological removal level (PBR)) is the starting point for analysis. If this criterion is satisfied (i.e., total human-related M&SI is less than 10% of PBR), the analysis would be concluded, and the impact would be determined to be negligible. If Criterion 1 is not satisfied, NMFS may use one of the other criteria as appropriate. Criterion 2 is satisfied if the total human-related M&SI is greater than PBR, but fisheries-related M&SI is less than 10% of PBR. If Criterion 2 is satisfied, vessels operating in individual fisheries may be permitted if management measures are being taken to address non-fisheries-related M&SI. Criterion 3 is satisfied if total fisheries-related M&SI is greater than 10% of PBR and less than 100% PBR, and the population is stable or increasing. Fisheries may then be permitted subject to individual review and certainty of data. Criterion 4 stipulates that if the population abundance of a stock is declining, the threshold level of 10% of PBR will continue to be used. Under Criterion 5, if total fisheries-related M&SI is greater than PBR, there is no negligible impact finding.

The time frame for this analysis primarily includes the most recent 5-year period for which available data have been processed and incorporated into a SAR (January 1, 2007 through December 31, 2011). The NMFS Guidelines for Assessing Marine Mammal Stocks (GAMMS) and the subsequent GAMMS II provide guidance that, when available, the most recent 5-year time frame of commercial fishery incidental serious injury and mortality data is an appropriate

measure of effects of fishing operations on marine mammals (Wade and Angliss 1997). A 5-year time frame generally provides enough data to adequately capture year-to-year variations in take levels, while reflecting current environmental and fishing conditions as they may change over time.

Negligible Impact Determinations

The final NID provides a complete analysis of the criteria for determining whether commercial fisheries off Hawaii are having a negligible impact on the stocks of CNP humpback whales, Hawaii sperm whales, and MHI IFKW. A summary of the analysis and subsequent negligible impact determinations follows.

Criterion 1 Analysis

Criterion 1 would be satisfied if the total human-related M&SI is less than 10% of PBR. The 5-year (2007-2011) annual average M&SI to the Hawaii stock of sperm whales from all human-caused sources is 0.7 animals, which is 6.89% of this stock's PBR of 10.2 (i.e., below the 10% of PBR threshold). Since the beginning of the NMFS Hawaii longline observer program in 1995, no deaths of sperm whales have been attributed to the Hawaii deep-set or shallow-set longline fishery. However, in 2011 a sperm whale was reported seriously injured (prorated as 0.75 serious injury) after interacting with the Hawaii deep-set longline fishery. Two other interactions with sperm whales in 1999 and 2002 were considered non-serious injuries. Based on this low likelihood of interactions, considered together with the lack of impacts of other commercial fisheries and other human-caused impacts, Criterion 1 has been met for the Hawaii stock of sperm whales. Therefore, NMFS determines that M&SI incidental to commercial fisheries will have a negligible impact on the Hawaii stock of sperm whales.

The 5-year (2007-2011) annual average M&SI of the CNP stock of humpback whales from all human-caused sources is 16.2 animals, which is 26.74% of this stock's PBR of 61.2 (i.e., above the 10% of PBR threshold). The total annual human-related M&SI for this stock of humpback whales is not less than 10% of PBR for the time frame considered.

The 5-year (2007-2011) annual average M&SI of the MHI IFKW stock from all human-caused sources is estimated to be 0.1 animals, which is 33.3% of this stock's PBR of 0.3 (i.e., above the 10% of PBR threshold). The total annual human-related M&SI for this stock of false killer whales is not less than 10% of PBR for the time frame considered.

Therefore, Criterion 1 was not satisfied for the CNP humpback and MHI IFKW because the total annual human-related M&SI for each of these two stocks is not less than 10% of PBR for each stock for the time frame considered. As a result, other criteria must be examined for the CNP humpback and MHI IFKW stocks.

Criterion 2 Analysis

Criterion 2 would be satisfied if the total human-related M&SI is greater than PBR, but fisheries-related M&SI is less than 10% of PBR. This criterion was not satisfied for either the CNP humpback or the MHI IFKW because while total human-related M&SI (detailed above) is believed to be less than 100% PBR for each stock, total fisheries-related M&SI (detailed below) is greater than 10% PBR for each stock for the time frame analyzed.

Criterion 3 Analysis

Unlike Criteria 1 and 2, which examine total human-caused M&SI relative to PBR, Criterion 3 compares total fisheries-related M&SI to PBR. Criterion 3 would be satisfied if the total commercial fisheries-related M&SI (including state and federal fisheries) is greater than 10% of PBR and less than 100% PBR for each stock for the time frame considered, and the

populations of these stocks are considered to be stable or increasing. Additionally, Criterion 3 acknowledges that there are reasons for individually reviewing fisheries if M&SI are above PBR, including considering information regarding any increases in permitted M&SI and any uncertainties with regard to population size, reproductive rates, and fisheries-related mortalities. If Criterion 3 is met, permits may be issued subject to review and certainty of data.

The total fishery-related M&SI from all commercial fisheries for the CNP humpback stock is estimated at 9.35 animals, or 15.3% of the PBR (of 61.2) for the 5-year average from 2007-2011. This is greater than 10% of PBR (6.1 animals) and less than 100% PBR (61.2 animals). The CNP humpback whale stock has a minimum population size of 7,469 and is estimated to be growing at a rate of up to 7% per year. A total of 0.75 humpback whales (prorated, based on NMFS' 2012 Policy on Distinguishing Serious from Non-serious Injuries) were observed, estimated, or assumed to have been either killed or seriously injured in the two fisheries considered in this authorization during the 2007-2011 time period. Accordingly, Criterion 3 is satisfied for the time frame analyzed (2007-2011). Therefore, we determine that M&SI of the CNP humpback whale stock incidental to commercial fishing is having a negligible impact on the stock because of individual review of data regarding the stock, including increased growth rate of the stock, limited increases in M&SI due to the relevant fisheries, and the level of fisheries-related M&SI is below the calculated PBR.

With regard to false killer whales, NMFS recognizes three stocks of false killer whales (Hawaii pelagic, MHI insular, and Northwestern Hawaiian Islands stocks) to be at risk of interacting with Hawaii longline gear. Of the three stocks, only the MHI IFKW is ESA-listed. For the Hawaii longline fisheries considered in this analysis, no MHI IFKW deaths have been observed since the NMFS Hawaii longline observer program began in 1995. From 2004-2012,

observers recorded three false killer whale interactions in the deep-set longline fishery and no false killer whale interactions in the shallow-set longline fishery in the MHI IFKW range. In the deep-set longline fishery, observers also recorded three interactions with unidentified blackfish, which are unidentified cetaceans known to be either a false killer whale or a short-finned pilot whale. Genetic sampling and photo identification are currently the only ways to distinguish MHI IFKWs from the other stocks, and these data were not collected from the animals involved in these interactions. In certain locations, the ranges of the MHI IFKW and pelagic false killer whales overlap. When the stock identity of a false killer whale hooked or entangled by the longline fisheries within the MHI IFKW/pelagic stock overlap zone cannot be determined, NMFS prorates the interaction to either the pelagic or MHI insular stock using a model that assumes that densities of MHI insular stock animals decrease and pelagic stock densities increase with increasing distance from shore (McCracken 2010).

Based on an analysis conducted for this NID, including the expansion from observed interactions to an estimate of fleet-wide interactions based on the fishery's total effort and the proration of blackfish and false killer whales of unknown stock identity (MHI IFKW versus pelagic), we estimate that a total of 8.73 interactions occurred with MHI IFKWs in the deep-set longline fishery from 2004-2013, including both serious and non-serious injuries. This estimate potentially overestimates the fishery's actual impact on MHI IFKW, since the proration model does not account for the Northwestern Hawaiian Islands false killer whale stock that was identified in 2011. For example, in 2012 two observed false killer whale interactions occurred in the area where all three Hawaiian false killer whales stocks overlap, but at this time they can only be attributed (prorated) to the pelagic or MHI insular stocks. In addition, earlier interaction

estimates are based on a much smaller abundance estimate for the pelagic false killer whale stock which influences the proration model and values.

Criterion 3 states that, where total fisheries-related M&SI are greater than 10% PBR and less than 100% PBR, and the population is stable or increasing, a permit may be issued subject to individual review and certainty of data. As described below, NMFS considered multiple data sets and other information in conducting this analysis and applying Criterion 3. First, the current PBR for the MHI IFKW is 0.3, and M&SI is estimated to be 0.1 based upon data from 2007-2011. These data underwent NMFS and Pacific Scientific Review Group (PSRG) review, were made available for public review and comment, and are available in the published 2013 final SAR (Caretta *et al.* 2014). In April, 2014 NMFS provided more recent data estimating abundance, calculating a PBR, and estimating M&SI for MHI IFKW in the deep-set fishery (the 2008-2012 timeframe) to the PSRG for review; they are described in the final NID (see ADDRESSES). Although the 2008-2012 analyses consider more recent data with regard to MHI IFKW and previous interactions with the fishery (compared to the 2007-2011 data presented in the 2013 SAR), they do not take into account recent changes in the fishery required by the FKWTRP (or Plan) regulations, nor are they intended to anticipate future interactions in a changed fishery. In 2010, NMFS convened the False Killer Whale Take Reduction Team (FKWTRT or Team), composed of commercial fishery representatives, conservation groups, scientists, the Marine Mammal Commission, state and federal officials, and other interested stakeholders, to prepare and propose a consensus take reduction plan that, when implemented by regulations, is expected to reduce longline fishery impacts on pelagic and MHI IFKWs to levels below PBR within six months and to insignificant levels approaching a zero M&SI rate (10% of PBR) over five years.

NMFS published the FKWTRP on November 29, 2012 (77 FR 71260) to reduce the M&SI of Hawaii pelagic and MHI IFKW's in Hawaii's longline fisheries. Measures within the Plan include gear modifications in the deep-set longline fishery to reduce the seriousness and frequency of injuries, reporting and captain training requirements, and area closures, including the closure of the IFKW stock's core range to longline fishing year-round. Specifically, the FKWTRP includes regulatory and non-regulatory measures, including: the required use of weak circle hooks, a minimum diameter for monofilament leaders and branch lines, extension of the Main Hawaiian Islands Longline Fishing Prohibited Area, annual training in mitigation techniques, establishment of a Southern Exclusion Zone and triggers for closure, and monitoring and reporting requirements. Most of the FKWTRP's regulations went into effect on December 31, 2012, but gear requirements for the deep-set longline fishery went into effect on February 27, 2013. The measures have been in place for less than two years, and their effectiveness is still being evaluated.

The Team is expected to meet at least annually to review the effectiveness of the Plan and may recommend to NMFS additional measures or changes to the Plan when warranted. NMFS anticipates that continued implementation of the FKWTRP regulations will ensure that reduced rates of fisheries-related M&SI of MHI IFKW's are maintained in the deep-set longline fishery. Monitoring and reporting requirements under the FKWTRP provide NMFS with the information necessary to prevent and respond to any unexpected impacts. Moreover, NMFS retains its authority under MMPA section 118(g) to issue emergency regulations and approve amendments to the FKWTRP, in consultation with the Team, where M&SI is having an immediate and significant adverse impact. If it is determined that the anticipated reductions in M&SI are not being met, data indicate that the population trajectory is declining, or the FKWTRP is otherwise

not meeting its objectives, NMFS, in consultation with the False Killer Whale Take Reduction Team, will utilize its authority to amend the FKWTRP regulations as necessary to ensure that the requirements of the MMPA are met. Additionally, under such circumstance, the NID would be re-evaluated pursuant to section 101(a)(5)(E)(iii), (iv), and (v) of the MMPA (16 U.S.C. 1371(a)(5)(E)(iii), (iv), and (v)).

While estimates of M&SI of MHI IFKW from longline fishing in the 2013 SARs (0.1 for 2007-2011) are currently below PBR (0.3), NMFS recognizes that more recent data estimating M&SI for MHI IFKW in this fishery (the 2008-2012 timeframe), although not yet publically reviewed, preliminarily indicate that M&SI of MHI IFKW in this fishery may be exceeding PBR. However, as explained above, these data do not contemplate the significant measures taken within the Plan, which are anticipated to reduce the deep-set longline fishery's impacts, one of the major, known historical threats to this population, to reduce M&SI to levels below PBR within six months and to insignificant levels approaching a zero M&SI rate (i.e., 10% of PBR) over five years.

With these measures in mind, NMFS conducted a more recent analysis of the likely effects of the Plan in reducing M&SI of MHI IFKW (McCracken 2014). Aware that interactions with the deep-set longline fishery within the range of the MHI IFKW stock were observed in 2012, NMFS considered the 2008-2012 data in the NID analysis and included these data in its analysis used to predict future levels of take in this fishery. This analysis indicates that future annual M&SI for the MHI IFKWs will remain at or below the stock's PBR level, based on expected levels of longline fishing effort and upon implementation of the measures within the Plan (McCracken 2014).

Regarding the population trend, although MHI IFKW abundance is believed to have declined markedly during the 1990s, at this time, the current population trajectory is unknown (Oleson et al. 2010). Nevertheless, NMFS acknowledges the need for more reliable information regarding stock trajectory, but notes that this uncertainty, along with the presence of substantial observer coverage in this fishery, was considered in the Team's deliberations and in the adoption of the specific measures for minimizing the impact of the fishery on IFKWs. As such, NMFS believes that the measures in place, coupled with the FKWTRT process, provide a meaningful, adaptive management tool with which to quickly monitor, identify, and respond to any unanticipated longline fishery impacts to the MHI IFKW population.

NMFS acknowledges that interactions with non-longline fisheries may be occurring, and continues to work cooperatively with the State of Hawaii and other partners to assess marine mammal interactions in state-managed fisheries. NMFS will continue to consult with the Hawaii Department of Land and Natural Resources to improve data collection in these fisheries.

To summarize, Criterion 3 is satisfied if total fisheries related M&SI is greater than 10% of PBR and less than 100% PBR, and the population is stable or increasing. Fisheries may then be permitted subject to individual review and certainty of data. The current PBR for the MHI IFKW is 0.3, while estimates of M&SI from longline fishing are a fraction below PBR (i.e., between 10% and 100% of PBR). While estimates of M&SI of MHI IFKW from longline fishing in the 2013 SAR (2007-2011) are currently below PBR, NMFS recognizes that more recent data estimating M&SI for MHI IFKW in this fishery (the 2008-2012 timeframe), although not yet publically reviewed, preliminarily indicate that M&SI of MHI IFKW in this fishery may be exceeding PBR. NMFS considered the 2008-2012 data in the NID and included these data in its analysis used to predict future levels of take in this fishery. This analysis indicates that future

annual M&SI for the MHI IFKW will remain at or below the stock's PBR level, based on expected levels of longline fishing effort and upon implementation of the measures within the Plan. Although NMFS has historic information of a larger IFKW population, it does not currently have sufficient information with which to reliably determine whether the current population is stable or increasing. NMFS acknowledges the need for more reliable information regarding stock trajectory, but notes that this uncertainty, along with the presence of substantial observer coverage in this fishery, was considered in the FKWTRT's deliberations and in the adoption of the specific measures for minimizing the impact of the fishery on IFKWs. NMFS retains its authority under MMPA section 118(g) to issue emergency regulations and approve amendments to the FKWTRP, in consultation with the FKWTRT, where M&SI is having an immediate and significant adverse impact. Additionally, under such circumstance, the NID would be re-evaluated pursuant to section 101(a)(5)(E)(iii), (iv), and (v) of the MMPA (16 U.S.C. 1371(a)(5)(E)(iii), (iv), and (v)). Accordingly, NMFS is satisfied that under the FKWTRT process, the longline fishery will have a negligible impact on the MHI IFKW.

In conclusion, based on the negligible impact criteria outlined in 1999 (64 FR 28800), the 2013 Alaska and Pacific SARs (Allen and Angliss 2014; Carretta *et al.* 2014), the FKWTRP, the predictive model, and the best scientific information and data available, NMFS has determined that for a period of up to three years, M&SI incidental to the Hawaii deep-set longline fishery and Hawaii shallow-set longline fishery will have a negligible impact on the CNP stock of humpback whales, the Hawaii stock of sperm whales, and the MHI insular stock of false killer whales. Therefore, vessels operating in these identified commercial fisheries within the range of the CNP humpback, Hawaii sperm whale, and MHI IFKW stocks may be permitted subject to

their individual review and the certainty of relevant data, and provided that the other provisions of section 101(a)(5)(E) are met.

Description of Fisheries

The Hawaii deep-set and shallow-set longline fisheries are the Federally-authorized fisheries classified as Category I and II in the 2014 LOF (NMFS 2014) that are known to seriously injure or kill ESA-listed marine mammals incidental to commercial fishing operations. Detailed descriptions of those fisheries can be found in the Final Biological Opinion on the continued operation of the Shallow-set Longline Swordfish fishery, dated January 30, 2012(NMFS 2012a); the 2013SARs (Carretta *et al.* 2014, Allen and Angliss 2014); and the final NID.

In accordance with MMPA section 118(c), only those vessels in the Hawaii deep-set and shallow-set longline fisheries that have registered for a Marine Mammal Authorization Permit are authorized to take marine mammals incidental to their fishing operations. Vessels holding this permit must comply with the FKWTRP and implementing regulations. The longline fisheries are limited access fisheries, with 164 transferable permits of which approximately 130 are currently active. Vessels active in these fisheries are limited to 101 ft in length. Hawaii-based longline vessels vary their fishing grounds depending on their target species. Most effort is to the north and south of the Hawaiian Islands between the equator and 40° N and longitudes 140° and 180° W; however, the majority of deep-set fishing occurs south of 20° N and the majority of shallow-set fishing occurs north of 20° N. The number of active vessels in the combined Hawaii-based deep-set and shallow-set longline fishery increased dramatically in the late 1980s and peaked at 141 vessels in 1991. The number of vessels in the combined longline fisheries has since ranged from 101 to 130. In 2011, 129 Hawaii-based longline vessels were

active in the deep-set longline fishery. The deep-set longline fishery operates year-round, although vessel activity increases during the fall and is greatest during the winter and spring months. The annual number of trips for the Hawaii-based longline fisheries has remained relatively stable, but there was a shift from mixed-target and swordfish-target trips to tuna-target trips from the early 1990s up to 2002. In the years 2000-2003, this shift reflected the regulatory closure of the shallow-set and mixed-target fisheries. In 2004, the shallow-set longline fishery was reopened but participation was limited to only six trips. In 2011, there were 1,388 combined longline trips (1,306 deep-set and 182 shallow-set), which resulted in a combined total of 18,623 sets (17,155 deep-set and 1,468 shallow-set). Effort in the combined longline fishery, measured by the number of hooks set, has ranged from approximately 39 to 42 million hooks per year from 2007-2011.

Conclusions for Permit

Based on the above assessment and as described in the accompanying NID, NMFS concludes that the incidental M&SI from vessels engaged in the Hawaii deep-set and shallow-set fisheries will have a negligible impact on the CNP stock of humpback whales, the Hawaii stock of sperm whales, and the MHI insular stock of false killer whales. The National Environmental Policy Act (NEPA) requires Federal agencies to evaluate the impacts of alternatives for their actions on the human environment. The impacts on the human environment of continuing the Hawaii deep-set and shallow-set longline fisheries, including the taking of threatened and endangered species of marine mammals, were analyzed in the Regulatory Amendment to the Western Pacific Pelagic Fishery Ecosystem Plan: Revised Swordfish Trip Limits in the Hawaii Deep-set Longline Fishery to Reduce Regulatory Discards with an Environmental Assessment (NMFS and WPFMC 2012); the False Killer Whale Take Reduction Plan Environmental

Assessment (NMFS 2012b); Amendment 18 to the Pelagics FMP and Final SEIS (NMFS and WPFMC 2009); Amendment 7 to the Pelagics FEP and Environmental Assessment (NMFS 2014a), and in the Final Biological Opinion prepared for the Hawaii shallow-set longline fishery (NMFS 2012a) and the Final Biological Opinion for the Hawaii deep-set longline fishery (NMFS 2014b), pursuant to the ESA. NMFS has prepared a record of environmental consideration that concludes that because this proposed permit would not modify any fishery operation and the effects of the fishery operations have been evaluated fully in accordance with NEPA, no additional NEPA analysis is required for this permit. Issuing the proposed permit would have no additional impact to the human environment or effects on threatened or endangered species beyond those analyzed in these documents.

Recovery Plans

Recovery Plans for humpback whales and sperm whales have been completed (see <http://www.nmfs.noaa.gov/pr/recovery/plans.htm#mammals>). A Recovery Plan has been initiated for the MHI IFKW (78 FR 60850, October 2, 2013). Accordingly, the requirement to have recovery plans in place or being developed is satisfied.

Vessel Registration

MMPA section 118(c) requires that vessels participating in Category I and II fisheries register to obtain an authorization to take marine mammals incidental to fishing activities. Further, section 118(c)(5)(A) provides that registration of vessels in fisheries should, after appropriate consultations, be integrated and coordinated to the maximum extent feasible with existing fisher licenses, registrations, and related programs. Registration for the Hawaii longline fisheries has been integrated into the existing permit process, and all permitted participants in the Hawaii deep-set and shallow-set longline fisheries are issued annual Marine Mammal

Authorization Program certificates with their new or renewed permits. Therefore, vessel registration for an MMPA authorization is integrated through those programs in accordance with MMPA section 118.

Monitoring Program

The Hawaii longline fisheries have been observed by NMFS observers since the mid-1990s. Levels of observer coverage vary over time but are adequate to produce reliable estimates of M&SI of ESA-listed species. From 2002-2013, observer coverage was greater than 20% in the deep-set longline fishery and has been 100% in the shallow-set longline fishery since 2004. Accordingly, as required by MMPA section 118, a monitoring program is in place for both fisheries.

Take Reduction Plans

Subject to available funding, MMPA section 118 requires the development and implementation of a Take Reduction Plan (TRP) when a strategic stock interacts with a Category I or II fishery. The three stocks considered for this permit are currently designated as strategic stocks under the MMPA because they are listed as endangered under the ESA (MMPA section 3(19)(C)).

In 2010, NMFS established the FKWTRT to develop a TRP to address the incidental M&SI of Hawaii pelagic and MHI IFKWs in the Hawaii-based deep-set and shallow-set longline fisheries. The FKWTRP was implemented, through regulations, in November 2012 (77 FR 71260). The short- and long-term goals of a TRP are to reduce M&SI of marine mammals incidental to commercial fishing to levels below PBR within six months and to insignificant levels approaching a zero M&SI rate (i.e., 10% of PBR) within five years. MMPA section

118(b)(2) states that fisheries maintaining insignificant levels of M&SI are not required to further reduce their M&SI rates.

The CNP stock of humpback whales and the Hawaii stock of sperm whales are also strategic stocks that interact with the Hawaii longline fisheries. However, the obligations to develop and implement a TRP are subject to the availability of funding. MMPA section 118(f)(3) ([16 U.S.C. 1387](#)(f)(3)) contains specific priorities for developing TRPs when funding is insufficient to develop and implement TRPs for all strategic stocks and Category I and II fisheries. NMFS has insufficient funding available to simultaneously develop and implement TRPs for all stocks that interact with Category I or Category II fisheries. NMFS used the most recent SARs and LOF as the basis to determine its priorities for establishing TRTs and developing TRPs. Through this process, NMFS evaluated the Hawaii stock of sperm whales and the CNP stock of humpback whales and the Hawaii longline fisheries and identified these as lower priorities compared to other marine mammal stocks and fisheries for establishing TRTs, based on M&SI levels incidental to those fisheries and population levels and trends. Accordingly, given these factors and NMFS' priorities, further developing TRPs for the Hawaii stock of sperm whale and the CNP stock of humpback whales in the Hawaii longline fishery will be deferred under section 118 as other stocks/fisheries are a higher priority for any available funding for establishing new TRTs.

As noted in the summary above, all of the requirements to issue a permit to vessels that operate in the Federally-authorized Hawaii deep-set and shallow-set longline fisheries have been satisfied. Accordingly, NMFS hereby issues a permit to participants in the Category I Hawaii deep-set longline fishery for the taking of CNP humpback whales, Hawaii sperm whales, and MHI IFKW's, and to the Category II Hawaii shallow-set longline fishery for the taking of CNP

humpback whales incidental to the fisheries' operations. As noted under MMPA section 101(a)(5)(E)(ii), no permit is required for vessels in Category III fisheries. For incidental taking of marine mammals to be authorized in Category III fisheries, any injuries or mortality must be reported to NMFS. If NMFS determines at a later date that incidental mortality and serious injury from commercial fishing is having more than a negligible impact on the CNP humpback whales, Hawaii sperm whales, or MHI IFKW stocks, NMFS may use its emergency authority under MMPA to protect the stock and may modify the permit issued herein, and re-evaluate the NID.

MMPA section 101(a)(5)(E) requires NMFS to publish in the Federal Register a list of fisheries that have been authorized to take threatened or endangered marine mammals. A list of such fisheries was most recently published on September 4, 2013 (78 FR 54553), which authorized the taking of threatened or endangered marine mammals incidental to the California thresher shark/swordfish drift gillnet fishery and the Washington/Oregon/California sablefish pot fishery. With issuance of the current permit, NMFS is not adding any fisheries to this list (Table 1).

Table 1. List of Fisheries Authorized to Take Specific Threatened and Endangered Marine Mammals Incidental to Commercial Fishing Operations.

Fishery	Category	Marine Mammal Stock
HI deep-set (tuna target) longline	I	Humpback whale, CNP stock Sperm whale, Hawaii stock MHI IFKW stock
CA thresher shark/swordfish drift	I	Fin whale, CA/OR/WA stock

gillnet fishery (≥ 14 in mesh)		Humpback whale, CA/OR/WA stock Sperm whale, CA/OR/WA stock
HI shallow-set (swordfish target) longline/set line	II	Humpback whale, CNP stock
AK Bering Sea/Aleutian Islands flatfish trawl	II	Steller sea lion, Western stock
AK Bering Sea/Aleutian Island pollock trawl	II	Fin whale, NEP stock Steller sea lion, Western stock
AK Bering Sea sablefish pot	II	Humpback whale, WNP stock Humpback whale, CNP stock
AK Bering Sea/Aleutian Islands Pacific cod longline fisheries	II	Steller sea lion, Western stock
WA/OR/CA sablefish pot fishery	II	Humpback whale, CA/OR/WA stock
AK miscellaneous finfish set gillnet	III	Steller sea lion, Western stock
AK Gulf of Alaska sablefish longline	III	Sperm whale, NP stock Steller sea lion, Eastern stock
AK halibut longline/set line (State and Federal waters)	III	Steller sea lion, Western stock
AK Bering Sea/Aleutian Islands Atka mackerel trawl	III	Steller sea lion, Western stock
AK Bering Sea/Aleutian Islands Pacific cod trawl	III	Steller sea lion, Western stock

AK Gulf of Alaska Pacific cod trawl	III	Steller sea lion, Western stock
AK Gulf of Alaska pollock trawl	III	Fin whale, NEP stock Steller sea lion, Western stock
CA set gill net	III	None documented
CA/OR/WA salmon troll	III	None documented
WA/OR/CA groundfish, bottomfish longline/set line	III	None documented
WA/OR North Pacific halibut longline/set line	III	None documented
CA halibut bottom trawl	III	None documented
WA/OR/CA shrimp trawl	III	None documented

Comments and Responses

On June 12, 2014 (79 FR 33726), NMFS proposed to issue a permit under MMPA section 101(a)(5)(E) to vessels registered in the Hawaii deep-set longline fishery to incidentally take individuals from three stocks of threatened or endangered marine mammals: the CNP stock of humpback whales, the Hawaii stock of sperm whales, and the MHI insular stock of false killer whales; and to vessels registered in the Hawaii shallow-set longline fishery to incidentally take individuals from the CNP stock of humpback whales. NMFS solicited comments on the proposal to issue a permit and the negligible impact determination and received comments from the Marine Mammal Commission (Commission); non-governmental organizations (The Humane Society of the United States (HSUS) on behalf of themselves and the National Resources Defense Council (NRDC); Earthjustice on behalf of the Center for Biological Diversity and

Turtle Island Restoration Network; Cascadia Research Collective (CRC); the Hawaii Longline Association (HLA)); the Western Pacific Regional Fisheries Management Council (Council); and three individuals. Most letters contained multiple comments. NMFS received comments both in support of and in opposition to the negligible impact determination and proposed permit. Two commenters supported the determinations for all three species, while several other commenters supported the determinations only for humpback whales and sperm whales. There were no comments in opposition to the negligible impact determinations or issuance of a permit for the incidental take of individual CNP humpback whales and Hawaii sperm whales. All comments in opposition to the issuance of a permit were specific to the deep-set fishery and MHI IFKW. These comments are addressed in detail below.

Comment 1: HLA asked NMFS to clarify how the agency has applied the 1999 negligible impact determination criteria, specifically to the MHI IFKW stock. HLA also recommended that NMFS explain its consideration of future M&SI impacts for MHI IFKW in light of the enactment of the FKWTRP regulations.

Response: NMFS believes that the rate of MHI IFKW M&SI is expected to decrease in response to the FKWTRP regulations, based upon a predictive model to account for the expected impact of the longline fishery on marine mammals. There is only one complete year of data since the FKWTRP regulations went into effect, and much of the data that have been collected have not yet been fully analyzed (e.g., injury determinations, bycatch estimates, etc.). When evaluating the deep-set longline fishery's expected impacts on the IFKW, we relied on historical M&SI since it represents the best available information, recognizing that the data were collected prior to the implementation of FKWTRP measures intended to mitigate the fishery's impacts on false killer whales. For example, the recently discovered NWHI stock of IFKW was not

accounted for in historic M&SI estimates, which were necessarily prorated only between the MHI insular and pelagic false killer whale stocks.

In preparing its analysis in the predictive model, NMFS took several steps to account for the changes under the FKWTRP regulations. For example, the predictive model incorporated the revised boundary of the MHI Longline Fishing Prohibited Area, and described our expectation of further reductions in M&SI due to other FKWTRP measures (gear regulations requiring the use of weak circle hooks and strong branchlines to allow for the release of the animal with reduced trailing gear and risk of injury). We also noted that the model's predicted level of M&SI was based on historical interactions that occurred in an area that, under the FKWTRP regulations, is now closed to longline fishing year-round. At this time, given the defined range of the IFKW stock, NMFS cannot conclude that the closure of this seasonal boundary will eliminate all risk of future fisheries-related M&SI to the stock, but we do believe that future M&SI will be extremely rare, on the order of only one animal every four years.

With regard to NMFS consideration of the 1999 negligible impact determination criteria, NMFS utilized Criterion 3 for MHI IFKW. Criterion 3 states that, where total fisheries-related M&SI are greater than 10% PBR and less than 100% PBR, and the population is stable or increasing, fisheries may be permitted subject to individual review and certainty of data. NMFS considered multiple data sets and other information in conducting this analysis and applying Criterion 3 in the case of the MHI IFKW. The 1999 criteria were intended to guide NMFS in its evaluation of fishery impacts on marine mammal stocks, while allowing NMFS to exercise discretion, through the use of notice and comment in the permitting process and to take into account additional relevant information in determining a fishery's expected impacts on a particular marine mammal stock. In this case, NMFS convened the FKWTRT, composed of

commercial fishery representatives, conservation groups, scientists, state and federal fishery resource management officials, the Commission, and other interested stakeholders, to prepare a consensus FKWTRP that, when implemented by regulations, would be expected to reduce longline fishery impacts on pelagic and MHI IFKW to less than PBR within six months and to insignificant levels approaching a zero mortality and serious injury rate (i.e., less than ten percent) of their respective PBR levels within five years of the plan implementation. As noted above, measures addressing the MHI IFKW include gear modifications to reduce the seriousness and frequency of injuries, reporting and captain training requirements, and area closures, including the closure of the MHI IFKW stock's core range. This Team is expected to meet at least annually to review the effectiveness of the Plan, and may recommend to NMFS additional measures or changes to the Plan when warranted.

The current PBR for the MHI IFKW is 0.3; estimates of M&SI from longline fishing are a fraction below PBR. Both PBR and M&SI are extremely small numbers, indicative of both the IFKW's small population size, as well as the fishery's low impact rate. Although NMFS has historic information of a larger IFKW population, it does not currently have sufficient information with which to reliably determine whether the current population is stable or increasing. NMFS acknowledges the need for more reliable information regarding stock trajectory, but notes that this uncertainty, along with the presence of substantial observer coverage in this fishery, was considered in the FKWTRT's deliberations and in the adoption of the specific measures for minimizing the impact of the fishery on IFKWs. Nevertheless, NMFS does have reliable information regarding the longline fishery's impacts on that stock and believes that the FKWTRT process provides a useful adaptive management tool with which to quickly monitor, identify, and respond to unanticipated longline fishery impacts to the IFKW population.

Moreover, NMFS retains its authority under MMPA section 118(g) to issue emergency regulations and approve amendments to the FKWTRP, in consultation with the FKWTRT, where M&SI is having an immediate and significant adverse impact. Additionally, should it be determined that M&SI of MHI IFKW are having an adverse impact on the stock, the negligible impact determination would be re-evaluated pursuant to section 101(a)(5)(E)(iii), (iv), and (v) of the MMPA (16 U.S.C. 1371(a)(5)(E)(iii), (iv), and (v)).

Comment 2: HSUS and Earthjustice commented that although the 2007-2011 data (in the 2013 SAR) indicate that MHI IFKW M&SI is less than PBR, the preliminary data for 2008-2012 (contained in the draft 2014 SAR, currently under internal agency review) indicate that M&SI exceeds PBR. Earthjustice emphasized that because M&SI of MHI IFKW were observed in 2011 and 2012, and NMFS reports bycatch estimates as 5-year running averages, PBR will continue to be exceeded in future SARs, rather than below PBR, as NMFS predicted in the draft NID and proposed permit.

Response: The NID analysis relies primarily on data from 2007-2011 because they are the most recent data that have gone through the MMPA review process and are available in a published SAR (the 2013 SAR). More recent data (the 2008-2012 timeframe) have been provided to the Pacific Scientific Review Group for review but have not yet been made available for public review and comment as a draft SAR. We recognize that interactions with the deep-set longline fishery within the range of the MHI IFKW stock were observed in 2012 and will be reported in the draft 2014 SAR, and the 5-year average M&SI rate calculated in the SAR will account for those interactions. We considered the 2008-2012 data in the NID analysis and incorporated those data into the model to predict future levels of take (McCracken 2014); this model indicates that future annual M&SI for the MHI IFKWs will remain at or below the stock's

PBR level, based on expected levels of longline fishing effort and upon implementation of the measures within the Plan.

Consistent with the application of the 1999 negligible impact determination criteria, NMFS may exercise our discretion under MMPA to take into account other relevant information, including the predictive model, when deciding whether to issue the permit. The M&SI referred to by the commenter occurred in an area to the north of the MHI, which is now closed to longline fishing year-round under the expanded MHI Longline Prohibited Area, as unanimously recommended by the FKWTRT and implemented by NMFS through the FKWTRP regulations. Moreover, as more fully described in the NID, M&SI for MHI IFKW is expected to be further reduced in response to a suite of mitigation measures contained in the FKWTRP, including gear requirements, the Southern Exclusion Zone trigger/closure, and captain training and reporting requirements, which went into effect in early 2013. Finally, preliminary observer data indicate there were no false killer whale interactions observed within range of the MHI IFKW stock in 2013 or in 2014 to date, which is consistent with the results of the predictive model.

Accordingly, NMFS believes that the predictive model, which better accounts for these changes to the fishery, provides the more reliable estimate of fisheries-related M&SI. NMFS expects the implementation of consensus measures that are specifically intended to address impacts on MHI IFKW, with the commitment to re-evaluate the NID, if warranted, is sufficient to support issuance of the NID.

Comment 3: HLA asserted that there has never been a documented interaction between the Hawaii longline fisheries and MHI IFKWs, despite high observer coverage and substantial genetic sampling of incidentally taken false killer whales. In addition, HLA cites NMFS'

statement that there are “no documented serious injuries or mortalities of [MHI IFKW stock] animals incidental to Hawaii’s longline fisheries” (75 FR 2853, January 19, 2010).

Response: The draft NID and its conclusions regarding M&SI of MHI IFKW are based on the final 2013 and preliminary draft 2014 Pacific SARs (which document past M&SI) and predictive modeling (which evaluates expected future M&SI by the fishery). The SARs, the predictive model, and the references cited therein provide information on the data and methods used in assessing and estimating M&SI of MHI IFKW, including the associated assumptions and uncertainties.

In evaluating potential impacts to MHI IFKW, NMFS accounted for uncertainty in stock identification when interactions occur, as well as data limitations based on observer coverage rates (generally 20% in the deep-set longline fishery). NMFS recognizes that although the FKWTRP regulations are expected to reduce the potential for impacts to the MHI IFKW to less than PBR within six months and to insignificant levels approaching a zero mortality and serious injury rate (i.e., less than ten percent) of their respective PBR levels within five years of the plan implementation, we cannot eliminate all risk of M&SI to the stock. MHI IFKW and pelagic false killer whales cohabit a considerable area referred to as the “overlap zone”. As noted in the SARs and the NID, interactions between the deep-set longline fishery and false killer whales and blackfish (unidentified cetaceans known to be either false killer whales or short-finned pilot whales) have been observed within the MHI insular/pelagic stock overlap zone. Genetic sampling and photo identification are currently the only ways to distinguish MHI insular from pelagic false killer whales; and, because of challenging sampling conditions, these data were not collected from the animals involved in the interactions observed within the MHI insular/pelagic stock overlap zone.

When takes cannot be affirmatively identified to a particular stock, they are subject to proration using peer-reviewed criteria that account for each stock's population and relative density. Takes of unidentified blackfish are prorated to each species, and false killer whales of unknown stock in the MHI insular/pelagic stock overlap zone are prorated to one stock or the other, based on various models (McCracken 2010). The assignment of take within the MHI insular/pelagic overlap zone is supported by GAMMS II. NMFS believes that proration is currently the best method for determining impacts among different stocks, given the challenges associated with making positive identifications of stock, and in accounting for impacts to all stocks.

Finally, the reference to the NMFS statement, "no documented serious injuries or mortalities of [MHI IFKW stock] animals incidental to Hawaii's longline fisheries," omits an entire sentence from the Federal Register notice, which states that the provided information comes from the 2008 and 2009 SARs. These SARs became final prior to reevaluation of the insular stock boundary and the establishment of the MHI insular/pelagic overlap zone and do not always necessarily represent the best available scientific and commercial information.

Comment 4: HLA and the Council commented that the current MHI IFKW stock boundary (uniform 140 km from the MHI) is overinflated, given satellite tagging data that indicate different movement patterns between leeward and windward sides of the MHI, and a maximum distance from shore of 51.4 km on the windward side. HLA stated that additional analysis by NMFS has led the agency to conclude that the currently defined range is overbroad.

Response: In the draft NID, NMFS identified the satellite tagging information suggestive of a reduced range of the MHI IFKW (from shore of 51.4 km) on the windward side of the MHI. In our analysis, we applied this information qualitatively along with other relevant information to

support our conclusion that the predictive model represents the maximum impact of the longline fishery that is reasonably likely to occur, and that actual impacts likely would be less. However, the data referred to by HLA represent an incomplete subset of available information on the MHI IFKW movements, and they are currently being reviewed to help inform the decision whether to revise the boundaries for several Hawaii false killer whale stocks. At this time, NMFS has not yet completed this review as part of the stock assessment process, and revised boundaries, if any, have not yet been determined. Accordingly, NMFS will continue to rely on the established stock boundaries for this NID analysis, while taking into account new satellite tagging information where relevant to our management decisions.

Comment 5: HLA recommended that NMFS reevaluate the historical (pre-2013) M&SI data in light of the new information on the MHI IFKW stock's range (described in Comment 4). HLA and the Council noted that all historical M&SI attributed to the MHI IFKW stock occurred on the windward side of the MHI beyond where MHI IFKWs have been observed or tracked. Given this information, HLA argues that the retrospective M&SI rate would be zero.

Response: As explained in the response to Comment 4, NMFS took into account the new satellite tagging information, along with other relevant information, in determining that the predictive model represents the maximum impact of the longline fishery that is reasonably likely to occur. This information is currently being reviewed to help inform the decision whether to revise the boundaries for several Hawaii false killer whale stocks.

Comment 6: HLA and the Council commented that the FKWTRP modified the existing MHI longline fishing prohibited area to eliminate the spatial overlap between MHI IFKWs and the longline fisheries, thereby eliminating the potential for MHI IFKW interactions with the longline fisheries. They note that modified year-round closure encompasses the locations of all

false killer whale interactions assigned to the MHI IFKW stock, as well as all areas where MHI IFKWs have been observed or tracked. Therefore, the fishery is not likely to adversely affect the MHI IFKW.

Response: The revision to the longline closure area is an important conservation measure to protect MHI IFKWs. However, as noted in FKWTRP final rule (77 FR 71260, November 29, 2012; comment/response 39) and IFKW ESA listing final rule (77 FR 70915, November 28, 2012; comment/response 13), the Plan's revision to the longline exclusion zone is expected to substantially reduce but not eliminate the risk of interactions between MHI IFKWs and the longline fisheries. MHI IFKWs, like all small cetaceans, are highly mobile and do not confine their movements within precise boundaries. Because a portion of the MHI insular/pelagic stock overlap zone, as it is currently defined, remains open to longline fishing, NMFS must account for the potential for future M&SI in its management decisions, rare as those interactions are expected to be. Although NMFS does not agree that the MHI longline fishing prohibited area eliminates all risk to the MHI IFKW, we believe that M&SI for MHI IFKW will occur at very low levels as determined in the NID, and therefore is not likely to jeopardize the continued existence of MHI IFKW as defined under the ESA (see Comment 11, below). We have accounted for the revision to the MHI longline fishing prohibited area and its associated conservation benefits in our predictive model.

Comment 7: CRC, HSUS, Earthjustice, and the Commission commented that the NID does not account for M&SI in fisheries other than the longline fisheries. The commenters assert that MHI IFKW interactions with non-longline fisheries may be occurring at a rate that exceeds PBR. Commenters provided the following arguments or information: (a) interactions with commercial fisheries were identified as a main threat to the MHI IFKW population in NMFS's

2010 status review; (b) non-longline fisheries are unmonitored, so marine mammal interactions are unreported or under-reported; (c) marine mammal depredation has been reported in nearshore (non-longline) fisheries; (d) a stranded MHI IFKW was shown to have ingested fishing hooks not used by the longline fisheries; (e) MHI IFKWs have scarring and fin disfigurements consistent with fisheries interactions, and the individual rate of fisheries interactions (based on scarring) for MHI IFKWs may exceed that for pelagic false killer whales, where M&SI is known to exceed PBR; (f) the apparent sex bias in the animals with fisheries-related scarring (all females) suggests that M&SI estimates may be negatively biased and may have a disproportionate impact on population dynamics; and (g) fisheries-related scarring does not occur with equal frequency in the three MHI IFKW social clusters, and there are coincident differences in survival rates for each cluster, so impacts by social cluster could have greater or lesser impact on the stock.

Response: NMFS recognizes that the NID may not account for all potential sources of M&SI, including unreported takes in fisheries other than Hawaii longline fisheries. However, the Hawaii longline fishery currently operates under a consensus FKWTRP that was specifically designed to reduce the longline fisheries' M&SI for pelagic and MHI IFKW to less than PBR within six months and to insignificant levels approaching a zero mortality and serious injury rate (i.e., less than ten percent) of their respective PBR levels within five years of the plan implementation in the Hawaii longline fisheries. Other coastal fisheries, including state-managed pelagic troll, kaka line, and short-line, as well as recreational fisheries, are not currently observed, and NMFS has received no self-reports from these fisheries of interactions with marine mammals. At present, the impacts of these fisheries on MHI IFKW have not been reliably documented. The State of Hawaii currently collects commercial fishing information on

depredation but not marine mammal interactions (i.e. hooking and entanglements). This information has limited usefulness for evaluating impacts to marine mammals. However, NMFS continues to consult with the State of Hawaii and other partners to assess and address marine mammal interactions in state-managed fisheries. Data collection on marine mammal interactions in state fisheries has been identified as a research priority by the Team. NMFS and the State of Hawaii have updated their existing ESA Section 6 Cooperative Agreement to include the MHI IFKW. Additionally, the State of Hawaii intends to submit a proposal for federal funding in response to the recent ESA Section 6 Federal Funding Opportunity that would address priority recovery actions for the MHI IFKW. NMFS will continue to work with the Hawaii Department of Land and Natural Resources within available budget and resource constraints to improve data collection in these fisheries.

With regard to the commenters pointing to specific examples of fin disfigurement, scarring, and hook ingestion to support an argument that fisheries impacts are occurring above and beyond those occurring from longline fishing, NMFS considered this information in its decision to list the MHI IFKW distinct population segment as an endangered species under the ESA. While NMFS shares the commenters' concerns as to what these incidents may mean to the species, it remains undetermined as to whether the observations of fin scarring would be deemed serious injuries, and if so, whether fishing hook ingestion caused M&SI of MHI IFKW.

In summary, in the absence of available information regarding the potential impacts of other fisheries on MHI IFKW, NMFS cannot determine their contribution to total fisheries-related M&SI. NMFS is basing its decision to issue the permit under Criterion 3, where known longline fishing M&SI is between 10% and 100% of PBR, and due to the fact that the longline fishery is subject to management under a consensus FKWTRP that is intended to reduce longline

impacts on MHI IFKW to levels below PBR within six months and to insignificant levels approaching a zero mortality and serious injury rate (i.e., less than ten percent) of their respective PBR level within five years of the plan implementation. NMFS remains concerned about the anecdotal evidence that MHI IFKW are interacting with other fisheries, and, therefore, NMFS is committed to working with the State of Hawaii and others to assess the frequency and severity of marine mammal interactions in state-managed fisheries, as well as the distribution of these interactions and how they may disproportionately affect different sexes or social clusters. Further, NMFS commits to working with the State of Hawaii and other partners at further reducing impacts to IFKW as appropriate.

Comment 8: CRC and one individual commented that NMFS did not account for contaminants as a source of human-caused M&SI in MHI IFKWs. CRC cited several papers and provided data showing that concentrations of persistent organic pollutants in individual MHI IFKWs exceed safe threshold concentrations, and suggested that high levels of persistent organic pollutants may have health impacts and thus potentially contribute to mortality.

Response: NMFS recognizes that contaminants may present a non-fisheries related threat to MHI IFKWs (e.g., Oleson *et al.*, 2010). NMFS is concerned about MHI IFKW exposure to persistent organic pollutants in particular; however, at present it is difficult to determine the contribution of contaminants on M&SI in MHI IFKWs. Within the timeframe analyzed for this NID, no mortalities of MHI IFKWs were attributed to acute contaminants exposure (Carretta *et al.* 2014). At this time, it remains unclear what effect chronic exposure to contaminants may be having on IFKW individuals and population health. Frequently, however, marine mammals are exposed to chronic low levels of contaminants and these chronic exposures can be extremely difficult to correlate to risks of M&SI or reproductive health and population survival.

Comment 9: CRC, HSUS, Earthjustice, and the Commission commented that the MHI IFKW M&SI data are uncertain, specifically in the prediction of M&SI in the longline fisheries and in accounting for M&SI in non-longline fisheries. The Commission suggested that the level of uncertainty in M&SI data, particularly for a stock with a PBR less than one animal per year, should be grounds for withholding issuance of the permit.

Response: NMFS acknowledges the uncertainty associated with the data. As more fully discussed above, NMFS' predictions account for data uncertainty by applying precautionary assumptions at various levels of the NID analysis. Although PBR for this stock is quite small, so is quantifiable M&SI from the longline fishery, and M&SI from longline fishing is based on prorated interactions that occurred in an area that is now permanently closed to longlining. Moreover, as more fully discussed in response to Comment 2, M&SI for the longline fishing is based on historical interaction data, collected prior to implementation of consensus FKWTRP measures that are specifically intended to reduce longline impacts on false killer whales to less than PBR within six months and to insignificant levels approaching a zero mortality and serious injury rate (i.e., less than ten percent of their respective PBR levels) within five years of the plan implementation. In addition, preliminary data indicate no M&SI for MHI IFKW in 2013 or in 2014 to date. Finally, under the adaptive management provisions of the FKWTRP and MMPA section 118(g), NMFS retains authority to amend the Plan, and implement emergency measures, should unanticipated impacts from the deep-set fishery threaten the conservation status of the MHI IFKW. Additionally, the negligible impact determination would be re-evaluated pursuant to section 101(a)(5)(E)(iii), (iv), and (v) of the MMPA (16 U.S.C. 1371(a)(5)(E)(iii), (iv), and (v)). Based on these considerations, NMFS believes that it is appropriate to issue the permit, notwithstanding the existence of some uncertainty in fishery-related M&SI.

Comment 10: Earthjustice stated that NMFS provides no justification for its claim that the use of new gear under the FKWTRP would reduce false killer whale M&SI by 6%.

Response: The FKWTRT, which consisted of conservation organization representatives, biologists, federal and state officials, the Commission, and fishing industry representatives, unanimously recommended the requirement for weak circle hooks based on their collective professional judgment that these hooks would reduce both the frequency and severity of incidental interactions with false killer whales. The NID considers Forney et al. (2011) as the source of the predicted 6% reduction in false killer whale M&SI associated with the exclusive use of circle hooks in the deep-set fishery. This estimate is the best available information regarding the expected benefits of these hooks.

Comment 11: The HSUS stated that a 2013 analysis of the biological impacts of the deep-set longline fishery by the Sustainable Fisheries Division of the NMFS Pacific Islands Regional Office concluded that the prorated level of M&SI of the MHI IFKW population incidental to the deep-set fishery (0.5 animals per year) exceeds the stock's PBR level of 0.3 animals per year, and that the longline fishery alone "may affect and is likely to adversely affect" the insular stock of false killer whales.

Response: The analysis cited by HSUS appears in the Biological Evaluation that was submitted to the NMFS Pacific Islands Regional Office Protected Resources Division from the Sustainable Fisheries Division in order to initiate formal consultation under Section 7 of the ESA on the continued authorization of the Hawaii deep-set longline fishery. The Sustainable Fisheries Division included information from the most recent SAR available to the public at that time (2012 SAR, which included data from 2006-2010) to be incorporated into the ESA Section 7 Biological Opinion analysis. During the consultation period and the analysis for the NID, more

recent data, including the predictive model, became available and were used in both the MMPA and ESA analyses.

As more fully discussed in the response to Comment 1, the M&SI estimates cited by the commenter are based on historical data that preceded implementation of the FKWTRP regulations. To reach this NID NMFS believed it appropriate to consider not only historical M&SI information, but also other information that may affect the conservation status of the stock, such as the measures included in the FKWTRP, and the predictive model.

The Sustainable Fisheries Division's analysis that the fishery "may affect and is likely to adversely affect" the MHI IFKW population was conducted per the specific requirements and standards of the ESA regarding whether to conduct formal, rather than informal, consultation under ESA section 7. This finding under the authority of the ESA does not foreclose the issuance of a NID under MMPA; rather, it means that some level of take is anticipated requiring formal consultation under the ESA.

Comment 12: CRC, HSUS, and Earthjustice commented that the results presented by McCracken (2014) indicate that M&SI in the longline fisheries likely exceed PBR. They argue that effort is likely to be closer to 1,000,000 hooks set in the "open area" than to the 600,000 hooks analyzed in the model, because effort will shift from the area that was previously (pre-FKWTRP) open seasonally to the area just outside the now-closed (post-FKWTRP) area. They claim the effort will not be redistributed evenly, as is analyzed in the model, but that it will cluster closer to shore and within the MHI IFKW stock range, creating pockets of higher effort which the model does not capture.

Response: NMFS completed a predictive model that, among other things, evenly redistributed an equal number of hooks that were removed from the area now closed to

longlining under the FKWTRP to offshore areas in the action area that remain open to longlining. NMFS does not anticipate that this redistributed effort will be close to or over 1,000,000 hooks in the “open area” or that redistributed effort will cluster along the boundaries of the expanded closure due to the nature of the fishery and the actual effort that was observed in 2013. Longline gear is typically set across 30-40 miles of water, and while some vessels will likely fish in the open area along the edge of the expanded longline closure, redistributed effort is most likely to occur where pelagic fishery resources are being caught at any given time. Since NMFS cannot predict where the fish will be found at any given time, we believe it was appropriate to assume an even redistribution of that effort throughout the action area.

In addition, logbook effort data were plotted to determine if there were clusters of effort just outside the boundary of the closed area, as indicated by the commenters. This an important consideration because false killer whale bycatch within the MHI insular/pelagic stock overlap zone is prorated to stock based on distance from shore, so interactions closer to shore have a higher probability of being assigned to the insular stock. The logbook data show that in 2013, proportionally less effort was concentrated on the inner boundary of the open area in 2013 than in previous years (McCracken, pers. comm.), indicating that the clustering effect suggested by the commenters is not occurring.

In 2008, just over a million hooks were set in the “open area” but effort has remained well below since that time (see Table 1 in McCracken 2014). In 2013 (the first year after the implementation of the FKWTRP), logbook data indicate that there were 98 sets and 344,808 hooks set in the open area, below the 600,000 hooks that were analyzed in the model (McCracken, pers. comm.). NMFS believes that effort may vary in the open area but will not likely reach levels of 1,000,000 hooks based on the last several years of data and current

regulatory measures in place for false killer whales under the FKWTRP. However, NMFS will continue to monitor fishing effort to identify any changes in the operation of the fishery that may warrant adjustments to its models and the effects on the NID analysis.

Comment 13: Earthjustice and HSUS argued that it is premature to rely on the FKWTRP to ensure that the deep-set fishery has a negligible impact to MHI IFKWs because it has not yet been shown to be effective. The commenters cite false killer whale takes that have been observed since the FKWTRP went into effect, including one for which the required gear did not perform as expected to straighten and release the hooked animal. One commenter expressed concern that NMFS is relying on a sample size of only one event to show that the new gear can straighten effectively and release a hooked animal.

Response: NMFS notes that, although the Plan has been in place for less than two years, its required measures represent the consensus effort of a diverse team of conservationists, scientists, and federal and state officials, to put in place conservation and management measures they believe will be effective in meaningfully reducing impacts on MHI IFKW. The FKWTRP has been in effect since December 31, 2012, and its gear regulations for the deep-set fishery in effect since February 27, 2013. Through the FKWTRP, NMFS has a tool with which to monitor and respond to impacts to MHI IFKW if M&SI should exceed PBR. The FKWTRP and the FKWTRT process provide an important adaptive management framework with which to identify, through reporting and monitoring, unanticipated impacts to the stock, and to develop additional remedial measures, such as through amendment of the FKWTRP, or through emergency rulemaking, to ensure any future impacts do not result in significant adverse impacts.

The FKWTRP is expected to reduce interactions with MHI IFKWs, primarily as a result of the revision to the existing longline prohibited area surrounding the MHI. The Team's

recommended revision implemented by NMFS eliminated the seasonal change in the boundary on the windward side of the MHI, thereby prohibiting longlining year-round within a large majority of the MHI IFWK's stock range. Since the FKWTRP and the revised longline prohibited area went into effect, there have been no observed false killer whale interactions within the range of the insular stock. The observed interactions noted by the commenters that occurred since the FKWTRP went into effect involved pelagic false killer whales and were not within the range of the insular stock.

In addition, the FKWTRP includes gear modifications that are expected to reduce the number and severity of false killer whale hookings. This expectation is supported by NMFS's analysis (e.g., bootstrap simulations detailed in Forney *et al.* 2011) and an experiment that demonstrated that the required hooks are capable of straightening and releasing a hooked false killer whale (Bigelow *et al.* 2012). There are now three observations of false killer whales straightening hooks that meet the FKWTRP's requirements and releasing the whales with no gear attached. NMFS, in consultation with the Team, will continue to monitor the effectiveness of the FKWTRP's gear and other requirements.

While NMFS cannot yet fully evaluate the impact of the Plan on false killer whale M&SI, since the implementation of the Plan there have been no observed false killer whale or blackfish interactions in the range of the MHI IFKW, and where interactions have occurred, the gear performed in a manner that the Plan intended, which means the hook straightened and the animal was released from the gear.

Comment 14: The HSUS, CRC, the Commission, and Earthjustice state that Criterion 3 is not met because the population trend is not stable or increasing and they point to the SARs, the 2010 status review, and Silva *et al.* (2013), as evidence that the population is declining.

Response: Although MHI IFKW are believed to have declined markedly during the 1990s, at this time, their current population trajectory is unknown (Oleson et al. 2010). Nevertheless, NMFS acknowledges the need for more reliable information regarding stock trajectory, but notes that this uncertainty, along with the presence of substantial observer coverage in this fishery, was considered in the Team's deliberations and in the adoption of the specific measures for minimizing the impact of the fishery on IFKWs. As such, NMFS believes that the measures in place, coupled with the FKWTRT process, provide a meaningful, adaptive management tool with which to quickly monitor, identify, and respond to any unanticipated longline fishery impacts to the MHI IFKW population. NMFS will continue to conduct and support research on the MHI IFKW population and trends.

Comment 15: CRC and the Commission recommended that NMFS work with State of Hawaii to collect data on and monitor marine mammal interactions in non-longline fisheries (e.g., via an observer program).

Response: NMFS recognizes the need for additional collection of information on marine mammal interactions in non-longline fisheries around Hawaii and that the State currently has minimal reporting requirements for marine mammal interactions with state-managed fisheries. NMFS continues to consult with the State of Hawaii and other partners to assess and address marine mammal interactions in state-managed fisheries. Data collection in state fisheries has been identified as a research priority by the FKWTRT. NMFS and the State of Hawaii have updated their existing ESA Section 6 Cooperative Agreement to include support for research and bycatch reduction for the Hawaiian insular false killer whale. Additionally, as indicted in the response to Comment 7, the State of Hawaii intends to submit a proposal for federal funding in response to the recent ESA Section 6 Federal Funding Opportunity that intends to address

priority recovery actions for the MHI IFKW. NMFS will continue to work with the Hawaii Department of Land and Natural Resources within available budget and resource constraints to improve data collection in these fisheries.

Comment 16: The HSUS stated that there is no recovery plan in place for the MHI IFKW stock, and that without a recovery plan to address the all anthropogenic impacts, permitting take in the deep-set fishery would violate the precautionary principle. The HSUS also stated that no take should be authorized in the absence of a recovery plan for this stock.

Response: Section 101(a)(5)(E) allows for the incidental taking of depleted marine mammal stocks by commercial fisheries, subject to certain findings and requirements. One such finding is that “a recovery plan has been developed or is being developed for such species or stock pursuant to the Endangered Species Act of 1973” (16 U.S.C. 1371(a)(5)(E)(i)(II)). NMFS acknowledges that a recovery plan has not yet been finalized, but the process to develop a recovery plan has been initiated (78 FR 60850, October 2, 2013).

Comment 17: The HSUS noted that making a NID triggers the requirement to reinitiate consultation and to issue an incidental take statement (ITS) under the ESA. They state that the 2012 Biological Opinion for the shallow-set longline fishery will need to be reinitiated due to the negligible impact determination. They state that the Biological Opinion being prepared for the deep-set fishery will require an ITS for the take of listed species and that the ITS must specify reasonable and prudent measures to mitigate the impact of take on the species and the individual animals to be taken, as well as a trigger for reinitiation of consultation. The HSUS argues that reliance on the FKWTRP is risk-prone, given the on-going false killer whale interactions, so additional mitigation measures must be adopted. They also state that a single take would/should

trigger emergency suspension of the fishery, as it would exceed the PBR for the three-year authorization.

Response: Because the MMPA 101(a)(5)(E) permit process analyzes impacts of the fishery as it is currently managed under existing fishery management plan regulations, reinitiation of consultation is only required if one or more of the triggers in 50 CFR 402.16 are met. Because NMFS has determined that there has been no take of MHI IFKW or sperm whales by the shallow-set fishery, the permit does not cover the shallow set fishery for those stocks. Moreover, issuance of the permit will not result in impacts to CNP humpback whales that were not already analyzed in the 2012 biological opinion; accordingly, reinitiation of consultation is not required.

With respect to the deep-set fishery, NMFS completed a Biological Opinion on September 19, 2014, consistent with ESA section 7, which considered information in the NID analysis. An ITS specifies reasonable and prudent measures and terms and conditions for mitigating the impact of take of protected species, as well as specify terms for reinitiation of consultation, and will become valid for cetaceans once this permit is finalized. This MMPA permit, although related to the Biological Opinion, is a separate determination that considers those factors specified in MMPA section 101(a)(5)(E).

NMFS disagrees that it is premature to rely on the FKWTRP to ensure that M&SI is less than PBR in the deep-set fishery which is described in greater detail in comment 13. We also disagree that a single take in the overlap zone should trigger an emergency suspension of the fishery because such take would exceed PBR. Based on the best available science, after an expansion factor (5) is applied to account for observer coverage (20%) and a proration factor (15%) is applied to account for the probability that an interaction in the overlap zone involves a

MHI IFKW, a single take in the overlap area would be the equivalent of 0.75 MHI IFKW. As a term and condition of the September 19, 2014 Biological Opinion on the deep-set fishery (NMFS 2014), two M&SI in the overlap area during any three-year period would trigger reinitiation of consultation and require the immediate convening of the FKWTRT to provide recommendations regarding possible emergency measures.

Comment 18: Earthjustice stated that NMFS should close off the entire 140 km range to eliminate the risk of longline fishery interactions with the MHI IFKW.

Response: This action is limited to determining whether to issue a permit under MMPA section 101(a)(5)(E), which would allow the Hawaii-based longline fisheries, as currently managed and operated, to incidentally take individuals from certain ESA-listed marine mammal stocks. Potential future measures to expand the range of the MHI longline fishing prohibited area, either through emergency rulemaking or amendment of the FKWTRP, are beyond the scope of this decision.

With regard to the commenter's suggestion of excluding longline fishing from the entire known range of the stock, the FKWTRP regulations prohibit longline fishing within the entire core range and a large portion of the "extended" range of the MHI IFKW stock (which extends out to 140 km from shore), which NMFS determined would substantially reduce the risk of MHI IFKW interactions in the longline fisheries. The FKWTRT unanimously concluded that by permanently extending the seasonal boundary of the MHI longline prohibited area to include all overlap areas where prorated interactions with MHI IFKW and pelagic false killer whales have occurred, the risk to MHI IFKW would be significantly reduced. NMFS emphasizes that like all small cetaceans, MHI IFKW do not confine their movements to precise areas. Nevertheless, while we cannot eliminate all risk to the MHI IFKW from longline fishing, predictive modeling

based on precautionary assumptions projects no more than one M&SI every four years. Under these circumstances, NMFS does not believe a further increase in the longline closure area is necessary to protect MHI IFKW. However, if the FKWTRP is not effective in protecting the stock, (i.e., if M&SI should exceed PBR), then NMFS, in consultation with the FKWTRT, will develop and implement additional measures to meet the MMPA take reduction goals and will re-evaluate the NID.

Comment 19: CRC states that given the small PBR for MHI IFKW and the relatively small overlap between the fishery and the population's range, there is insufficient observer coverage within the "open area" to produce reliable estimates of longline M&SI for the MHI IFKW and that an analysis to determine the sample size of observer coverage is required within the area to have a reasonable probability of detecting bycatch that may approach or exceed PBR.

Response: NMFS acknowledges CRC's concern regarding the adequacy of observer coverage levels to detect take levels that could exceed PBR, given the stock's small PBR level and the small area of overlap between the fisheries and the stock. NMFS's Hawaii Longline Observer Program is designed to provide representative coverage of fishing effort by the fleet, but is not designed to cover specific areas of operation. However, in considering CRC's comment, we evaluated the level of observer coverage in the "open area" (the area of overlap between the longline fisheries and MHI IFKWs). We calculated this as the number of trips observed within the area divided by the number of trips recorded as fishing within the area. We note that these coverage levels do not imply a random sample, a representative sample, or that coverage was constant throughout the year. Despite these caveats, in recent years, coverage in the open area has been as follows: 2008, 13.6%; 2009, 16.1%; 2010, 25.4%; 2011, 18.8%; 2012, 26.1%; 2013, 22.4%, which is 20.4% for a six-year average. An analysis described in the report

from NMFS's 2011 workshop on revising the GAMMS (Moore and Merrick, 2011) indicates that for a stock with a PBR of 1.0 and observer coverage of 20%, data pooled across four or more years would achieve an approximately unbiased estimate of M&SI. NMFS regularly pools M&SI estimates across five years to produce average annual estimate for comparison to PBR and believes that this level of observer coverage in the open area, combined with the pooling of M&SI data provide sufficiently reliable information with which to assess IFKW bycatch in the deep-set longline fishery.

Dated: October 10, 2014.

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